

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1002

COLLEGE HILL PROPERTIES, LLC, & others¹

vs.

COLLEGE OF THE HOLY CROSS & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs (sometimes, collectively, College Hill) complain that the College of the Holy Cross and its associate dean of students, Paul Irish (Holy Cross defendants), have since at least 2010 conspired with the city of Worcester (city) to violate College Hill's rights and to damage its business. College Hill commenced this action on December 13, 2016, nearly seven years after it allegedly was injured. A Superior Court judge dismissed the complaint, concluding that the applicable statutes of limitation barred College Hill's claims. See G. L. c. 260, § 2A (three-year limitations on tort claims); G. L. c. 260, § 5B (three-year limitations on civil rights claims). We affirm.

¹ Caro Street Properties, LLC; Clay Street Properties, LLC; Paul F. Giorgio; and Diana H. Giorgio.

² Paul A. Irish.

Background. As this is an appeal from a dismissal pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), we assume the truth of the well-pleaded facts alleged in the complaint. Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 14 (2018). Since at least 2009, the plaintiffs have owned several two- and three-family homes in the city, which they have rented to Holy Cross students, with four students in each unit. Beginning in 2009, the city took several actions intended to interfere with the plaintiffs' ability "to conduct business and rent to students."³ These actions included evicting tenants from properties owned by the plaintiffs, where those properties were occupied by more than three unrelated persons. The city claimed that a city ordinance barred more than three unrelated persons sharing the same unit. The plaintiffs alleged that no such enforcement actions were taken against tenants of other, similarly situated landlords.

The city is not a named defendant in this action, however. Rather, the complaint alleges that the Holy Cross defendants "act[ed] in unison," or "employ[ed] a common scheme and concerted effort," with the city in its illegal enforcement

³ The complaint does not state the date that these actions began but the date is ascertainable from decisions in earlier, related cases, which we discuss infra. This court may take judicial notice of the prior court decisions, for this purpose. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002); Mass. G. Evid. § 201(b)(2) (2019).

campaign against the plaintiffs. The complaint alleges counts for violation of the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H and 11I, and for intentional interference with advantageous and prospective business relations.⁴

This is not the first lawsuit to address this nucleus of facts. In 2010, the plaintiffs challenged the city's enforcement efforts on the ground that the ordinance the city relied upon did not apply to the plaintiffs' properties. The Supreme Judicial Court agreed with the plaintiffs; it accordingly reversed several lower court decisions that had ordered the eviction of the plaintiffs' tenants, and that had held the plaintiffs in contempt of court. Worcester v. College Hill Props., LLC, 465 Mass. 134 (2013). Thereafter, in 2014, the plaintiffs sued the city for damages arising from these same actions, alleging violations of Federal constitutional law (Federal suit). The Federal suit was dismissed by the Federal courts, on statute of limitations grounds. College Hill Props., LLC v. Worcester, 135 F. Supp. 3d 10 (D. Mass. 2015), aff'd, 821 F.3d 193 (1st Cir. 2016).

This third lawsuit was filed in Superior Court on December 13, 2016. The principal difference between this suit, and the Federal suit, is that this suit seeks damages from the Holy

⁴ In addition, the complaint purports to allege one count of "civil conspiracy" between unnamed city employees and the Holy Cross defendants.

Cross defendants. While for the most part the complaint in this case does not identify specific dates of the actions the plaintiffs complain of, the actions the complaint identifies -- such as evicting student tenants, conducting warrantless searches of the plaintiffs' properties, and attempting to intimidate the plaintiffs' prospective tenants -- are the same actions discussed in the decisions in the plaintiffs' lawsuits against the city. See College Hill Props., LLC, 135 F. Supp. 3d at 13-14; Worcester, 465 Mass. at 134-136. In their brief, the plaintiffs concede that these actions began in 2009.

The defendants moved to dismiss the complaint under rule 12 (b) (6), arguing that the claims were barred by the applicable three-year statute of limitations. See, e.g., Pagliuca v. Boston, 35 Mass. App. Ct. 820, 822-823 (1994). The motion judge agreed, rejecting the plaintiffs' argument that the claims were saved by the "continuing violation" doctrine.

Discussion. On appeal the plaintiffs do not contest that the applicable statute of limitations is three years, or that the actions set forth in the complaint took place more than three years before filing. Nor do the plaintiffs contest that they were injured before December of 2013. Moreover, on appeal the plaintiffs no longer rely on the "continuing violation" doctrine that they invoked before the motion judge.

Instead, the plaintiffs argue that while they were aware of the city's misconduct "by 2010," they did not know, "until after December 12, 2013," that the Holy Cross defendants were "aiding, if not guiding" the city's actions. Accordingly, the plaintiffs now rely on the discovery rule, arguing that the actions of the Holy Cross defendants were "inherently unknowable" prior to December 2013. The civil rights cause of action and the intentional interference causes of action each accrued upon injury or commission of the allegedly wrongful act. See, e.g., Pagliuca, 35 Mass. App. Ct. at 822-824 (discussing statute of limitations for both civil rights and tortious interference causes of action). The discovery rule provides an exception to accrual, however, where the injury, or allegedly wrongful act, was "inherently unknowable." Id. at 823-824.

The plaintiffs' reliance on the discovery rule fails, because they did not make a discovery rule argument before the motion judge. The plaintiffs raised only a "continuing violation" theory in opposition to the motion to dismiss, and the two doctrines are distinct. Since the discovery rule argument was not raised, it was waived. Palmer v. Murphy, 42 Mass. App. Ct. 334, 338-339 (1997). We reject the plaintiffs'

argument that the "public interest" should lead us to ignore their waiver.⁵

Since we affirm on statute of limitations grounds, we need not consider the Holy Cross defendants' argument that the decision in the Federal suit precludes College Hill's present claims; nor need we reach the additional alternative grounds for affirmance that Holy Cross raises. Holy Cross's request for its appellate attorney's fees does not rise to the level of appellate argument and we do not consider it. See Mass. R. A. P. 16 (a) (4), as amended, 376 Mass. 921 (1975);⁶ People's

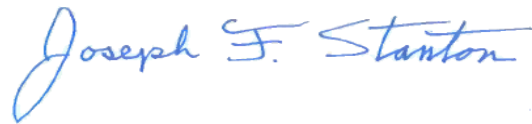
⁵ Even if it had been raised, the plaintiffs' "inherently unknowable" argument is questionable at best. The plaintiffs concede that they were aware of their injuries in 2010, and indeed were actively involved in litigation at that time, seeking to stem their harm. While the plaintiffs now assert in their brief that they were unaware of the alleged complicity of the Holy Cross defendants prior to 2013, the plaintiffs make no allegations in their complaint regarding their lack of knowledge. The operative facts took place primarily in 2009 and 2010, and the plaintiffs' own pleadings in the 2014 Federal action accused Holy Cross of "deliberately misinform[ing]" Holy Cross students in 2010 that the defendants' properties were "banned" or "under investigation."

⁶ See now Mass. R. A. P. 16 (a) (10), as appearing in 481 Mass. 1628 (2019), effective March 1, 2019.

United Bank v. B&B Fire Protection, Inc., 94 Mass. App. Ct. 626,
633 n.16 (2019).

Judgment affirmed.

By the Court (Rubin,
Massing & Englander, JJ.⁷),



Clerk

Entered: October 28, 2019.

⁷ The panelists are listed in order of seniority.